Lau Tiong Ik Construction Sdn Bhd v The Government of Malaysia

HIGH COURT (KUCHING) — ORIGINATING MOTION NO 25–29 OF 2005-II
HAMID SULTAN JC
14 AUGUST 2007

Arbitration — Award — Remission — Allegation of technical misconduct on findings of facts — Whether there were serious flaws in arbitrator's findings — Whether court could intervene — Arbitration Act 1952 s 23 — Rules of the High Court 1980 O 69

The dispute arose between the parties in the course of construction works, wherein the applicant referred the dispute to arbitration through cl 43 of the general conditions of contract. An arbitrator was appointed and he made two interim awards and confirmed that the awards were final and conclusive save for the issues of finance charges, interest and costs. The applicant submitted that there were serious flaws in the findings in interim report 2 and applied for an order to remit the award for reconsideration pursuant to s 23 of the Arbitration Act 1952 ('the Act'), O 69 of the Rules of the High Court 1980 ('the RHC') and the common law on grounds of error of law on the face of the interim award and/or misconduct by the arbitrator. The respondent in opposing the application submitted, inter alia, that the matter concerned whether the court could exercise its power under s 23 of the Act; that the arbitrator had clearly stated his reasons (in respect of variation order 22) and came to his finding without any mistakes of law; that the arbitrator's reason for disallowing the sums under variation order 21 had been dealt with and that the applicant had failed to discharge the burden of proof; that there were no errors of law in respect of variation order 52 and the reasons were given and the arbitrator had the same powers and discretion as the court when it comes to awarding interest.

Held, dismissing the application with costs:

(1) Section 23 of the Act provides power to the High Court to remit to the arbitrator or umpire for reconsideration. Though the grounds for remission were not stated, the High Court will remit to the arbitrator or umpire where the award is bad in law, or there has been a misconduct on the part of the arbitrator or umpire; save a defect or error is patent

on the face of the award, or the award is ambiguous or uncertain or is inconsistent with the terms of the contract, where there is new evidence after the making of award, etc. The applicant must show an error of law on the face of the award for the court to interfere (see paras 7(a) & (e)).

(2) Cases where an award had been remitted include, inter alia: (i) where fresh evidence had been acquired after the award, unless the evidence was merely misunderstood or misconceived or could not affect the conclusions arrived at; (ii) where the arbitrator had exceeded his jurisdiction by dealing with a matter not submitted to him; (iii) where there had been misconduct on the part of the arbitrator; (iv) where there had been an admitted mistake; (v) where there had been a mistake of law which was apparent on the face of the award (the court cannot interfere where the mistake concerned a point which specifically referred to the decision of the arbitrator); (vi) where the award had not, or not exhaustively, dealt with the question of costs; (vii) where a mistake occurred in the form of the award due to the arbitrator not having the submission before him when he drew the award; (viii) where the award was in the form of a special case and left the question as to the measure of damages to the court, it would be remitted with instructions as to the principle to be followed; (ix) where there was a refusal to state a special case or to delay the award till application could be made to the court to order a special case; and (x) where a point was taken but not argued before the arbitrator. The applicant's case did not fall into any of the captions therein (see para 7(g)).

(3) Generally, technical misconduct on the findings of fact cannot be a basis to remit. Allegations of errors of law and/or facts have to be proved before s 23 can be invoked and it would be appropriate to state as such. The award of interest is at the discretion of the arbitrator (see paras 7(h)–(j)).

(4) Section 23 of the Act gives very limited powers for the court to intervene and is an exception rather than a general rule for applicants to come and complain in respect of an award made by an arbitrator. The applicant had not substantiated an iota of evidence or allegation of misconduct and was not able to show the error of law. The terms which the applicant was relying on were terms which needed the arbitrator to consider the facts, the evidence and submission of the parties before arriving at the conclusion what the quantum ought to have been. The arbitrator had meticulously dealt with the matter, exercised his discretion and made the award on the facts and circumstances of the case. To complain that the quantum should have been higher did not fall within the purview of s 23 of the Act (see paras 8 & 8(c)).

(5) The arbitrator is the sole judge of the quality as well as quantity of evidence, and it was not open for the court to take upon itself the task

of being a judge of the evidence before the arbitrator. An award cannot be remitted when the error complained of was committed in the exercise of the arbitrator's jurisdiction (see para 8(d)).

[Bahasa Malaysia summary

Pertikaian ini timbul antara pihak-pihak semasa kerja-kerja pembinaan dijalankan, di mana pemohon telah merujuk pertikaian tersebut kepada penimbang tara melalui klausa 43 kepada syarat-syarat am kontrak. Penimbang tara telah dilantik dan telah membuat dua award interim dan mengesahkan bahawa award-award tersebut adalah muktamad dan konklusif kecuali jika terdapat isu-isu bayaran-bayaran kewangan, faedah dan kos. Pemohon telah berhujah bahawa terdapat kecacatan serius dalam dapatan di dalam laporan interim 2 dan memohon untuk perintah meremitkan award tersebut untuk dipertimbangkan semula menurut s 23 Akta Timbangtara 1952 ('Akta'), A 69 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan *common law* atas alasan kesilapan undang-undang pada award interim tersebut dan/atau salah laku oleh penimbang tara. Responden yang menentang permohonan tersebut menghujahkan, antara lain, bahawa perkara tersebut adalah berkaitan sama ada mahkamah boleh menggunakan kuasanya di bawah s 23 Akta tersebut, bahawa penimbang tara dengan jelas telah menyatakan sebab-sebabnya (berkaitan perintah pengubahan 22) dan mencapai dapatannya tanpa apa-apa kesilapan undang-undang; bahawa alasan penimbang tara untuk tidak membenarkan jumlah-jumlah di bawah perintah pengubahan 21 dikendalikan dan bahawa pemohon telah gagal melepaskan beban pembuktian; bahawa tiada kesilapan undang-undang berkaitan perintah pengubahan 52 dan alasan-alasan yang diberikan dan penimbang tara mempunyai kuasa dan budi bicara yang sama dengan mahkamah apabila ia membuat award untuk faedah.

Diputuskan, menolak permohonan dengan kos:

(1) Seksyen 23 Akta memperuntukkan kuasa ke atas Mahkamah Tinggi untuk meremitkan kepada penimbang tara atau pengadil untuk pertimbangan semula. Meskipun alasan-alasan untuk pengampunan tidak disebut, Mahkamah Tinggi akan meremitkan kepada penimbang tara atau pengadil jika award tidak sah di sisi undang-undang, atau terdapat salah laku di pihak penimbang tara atau pengadil; kecuali jika kecacatan atau kesilapan itu adalah jelas pada award tersebut, atau award itu tidak jelas atau tidak tentu atau tidak konsisten dengan terma-terma kontrak, di mana terdapat keterangan baru selepas membuat award tersebut, dll. Pemohon hendaklah menunjukkan kesilapan undang-undang pada award untuk mahkamah campur tangan (lihat perenggan 7(a) & (e)).

(2) Kes-kes di mana award telah diremitkan termasuklah, antara lain: (i) di mana keterangan baru diperoleh selepas award tersebut, kecuali keterangan tersebut cuma disalah faham atau disalah tanggap atau tidak boleh menjejaskan kesimpulan yang dibuat; (ii) di mana penimbang tara melampaui bidang kuasanya dengan mengendalikan perkara yang tidak dikemukakan kepadanya; (iii) di mana terdapat salah laku di pihak penimbang tara; (iv) di mana terdapat kesilapan yang diakui; (v) di mana terdapat kesilapan undang-undang yang jelas pada award (mahkamah tidak boleh campur tangan di mana kesilapan itu berkaitan yang khusus merujuk kepada keputusan penimbang tara); (vi) di mana award tersebut tidak, atau tidak sepenuhnya, berkaitan dengan persoalan kos; (vii) di mana kesilapan berlaku dalam bentuk award akibat daripada penimbang tara tidak mempunyai penghujahan di hadapannya semasa beliau membuat award tersebut; (viii) di mana award tersebut dalam bentuk kes istimewa dan menyerahkan persoalan berhubung ukuran ganti rugi kepada mahkamah, ia akan diremitkan atas arahan berhubung prinsipal yang perlu diikut; (ix) di mana terdapat keengganan untuk menyatakan kes istimewa atau untuk melengahkan award tersebut hingga permohonan boleh dibuat ke mahkamah untuk memerintahkan kes istimewa; dan (x) di mana poin diambil tetapi tidak dihujahkan di hadapan penimbang tara. Kes pemohon tidak terangkum di bawah mana-mana kapsyen berkenaan (lihat perenggan 7(g)).

(3) Pada amnya, salah laku teknikal atas penemuan fakta tidak boleh menjadi asas untuk meremit. Dakwaan-dakwaan mengenai kesilapan-kesilapan undang-undang dan/atau fakta perlu dibuktikan sebelum s 23 boleh digunakan dan ia adalah sesuai untuk dinyatakan sedemikian. Award untuk faedah adalah atas budi bicara penimbang tara (lihat perenggan 7(h)-(j)).

(4) Seksyen 23 Akta memberikan kuasa terhad kepada mahkamah untuk campur tangan dan ia adalah suatu pengecualian dan bukan rukun am untuk pemohon-pemohon tampil ke hadapan dan mengadu berhubung award yang dibuat oleh penimbang tara. Pemohon tidak mengesahkan sebarang keterangan atau dakwaan salah laku dan tidak mampu untuk menunjukkan kesilapan undang-undang. Terma-terma yang pemohon bersandarkan adalah terma-terma yang memerlukan penimbang tara menimbangkan fakta-fakta, keterangan dan penghujahan pihak-pihak sebelum mencapai keputusan apa kuantum yang patut diberikan. Penimbang tara dengan teliti mengendalikan perkara tersebut, menggunakan budi bicaranya dan membuat award atas fakta dan keadaan kes. Untuk mengadu bahawa kuantum tersebut patut lebih tinggi tidak terangkum di bawah s 23 Akta (lihat perenggan 8 & 8(c)).

(5) Penimbang tara adalah satu-satunya hakim yang menentukan kualiti

dan kuantiti keterangan, dan ia tidak terbuka kepada mahkamah untuk mengambil tugas hakim terhadap keterangan di hadapan penimbang tara. Suatu award tidak boleh diremitkan apabila kesilapan yang diadukan telah dilakukan semasa pelaksanaan bidang kuasa penimbang tara (lihat perenggan 8(d)).]

Notes

For cases on remission of award, see 1 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1299–1307.

Cases referred to

Arosan Enterprises Ltd v Union of India AIR 1999 SC 449 (refd)
Bijendra Nath Srivastava v Mayank Srivastava AIR 1994 SC 2562 (refd)
CK Tay Sdn Bhd v Eng Huat Heng Construction & Trading Sdn Bhd [1989] 1 MLJ 389 (refd)
Chai Ming v The Overseas Asscc Corpn Ltd [1962] MLJ 282 (refd)
Chaim Tau Tze & Anor v The Sarawak Land Consolidation and Rehabilitation Authority and another case [1994] 3 CLJ 605 (refd)
Dato' Teong Teck Kim & Ors v Dato' Teong Teck Leng [1996] 1 MLJ 178 (refd)
Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd [2003] 1 MLJ 49 (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481 (refd)
Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd [1994] 2 MLJ 51 (refd)
Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (refd)
Tai Wah Construction Co v Government of Malaysia (Jabatan Kerja Raya Sarawak) [2005] 2 MLJ 442 (refd)
Union of India v Rallia Ram AIR 1963 SC 1685 (refd)

Legislation referred to

Arbitration Act 1952 ss 21, 23, 24
Arbitration Act 2005 s 50(2), (3)
Arbitration Act 1950 [UK] s 22
Rules of the High Court 1980 O 69

JB Singh (JB Singh & Co) for the applicant.
Liz Maisarah (Azizan bin Md Arshad with her) (Attorney-General's Chambers) for the respondent.

Hamid Sultan JC:

[1] This is my judgment in respect of the applicant's originating motion encl 3 seeking an order to remit an interim award made by the arbitrator for

reconsideration, pursuant to s 23 of the Arbitration Act 1952 ('AA 1952'), O 69 of the Rules of the High Court 1980 and the common law on the grounds of error of law on the face of the interim award and/or misconduct on the part of the arbitrator. The respondent has not filed an opposing affidavit.

[2] Both parties agree that AA 1952 is applicable notwithstanding the Act has been repealed by Arbitration Act 2005 ('AA 2005') which came into force on 15 March 2006, in consequence of the savings provisions of s 50(2) and (3) of AA 2005 which reads as follows:

> (2) Where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted.
>
> (3) Nothing in this Act shall affect any proceedings relating to arbitration which have been commenced in any court before the coming into operation of this act.

[3] The applicant says the arbitrator has made two interim awards and in the interim award No 2 the arbitrator confirms that the interim award No 2 read together with interim award No 1 is final and conclusive of all issues of the arbitration, save for the issues of finance charges, interest and costs. The arbitrator is still in the process of publishing, but, has not yet published the final award on the issues of finance charges and costs. The applicant submits that there are serious errors of law in the arbitrator's findings in the interim award No 2, in relation to variation order Nos 22, 21 and 52. The reliefs prayed for these variation orders are as follows:

> (i) that Interim Award No 2 be remitted to the arbitrator for his reconsideration in so far as it affects his findings and award in relation to Variation Order No 22 in D12.15.7, D12.15.8, D12.15.9, D12.15.10, and D12.15.11, and 6.0 thereof;
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> (ii) that Interim Award No 2 be remitted to the arbitrator for his reconsideration in so far as it affects his findings and award in relation to Variation Order No 21 in D12.7.2, D12.7.4, D12.7.5, and D12.7.6 and 6.0 thereof; and
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> (iii) that Interim Award No 2 be remitted to the arbitrator for his reconsideration in so far as it affects his findings and award in relation to Variation Order No 52 in D12.11.2, and D12.11.3, and 6.0 thereof.

[4] In this case, dispute and differences arose between the parties in the course of the construction works. The applicant had invoked the provisions

for arbitration set out in cl 43 of the general conditions of contract to refer the disputes and differences to arbitration. The said clause reads as follows:

> 43 Provided always that in case any dispute or difference shall arise between the Employer or the Engineer on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this contract to the discretion of the Engineer or the withholding by the Engineer of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in clause 15 of these Conditions or the rights and liabilities of the parties under clauses 30, 40 or 41 of these Conditions), then either party shall forthwith give to the other notice in writing of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed upon between the parties in accordance with and subject to the provisions of the Arbitration Ordinance, and the award of such arbitrator shall be final and binding on the parties. Such reference, except on the questions whether or not a certificate has been improperly withheld or is not in accordance with clause 35 of these Conditions, or on any dispute or difference under clauses 40 or 41 of these Conditions, shall not be opened until after the completion or alleged completion or abandonment of the Works, unless with the written consent of the Employer or the Engineer on his behalf and the Contractor. Subject to the provisions of clause 35(g) of these Conditions the arbitrator shall without prejudice to the generality of his powers have power to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given.

By consent order made between the parties in Originating Summons No 24–7 of 2000, Mr Khoo Choong Keow was appointed the sole arbitrator to arbitrate the dispute.

[5] The applicant contends as follows:

(a) On Variation Order No 22 which reads as follows:

D12.15.7	… Claimant has claimed SOR Item 41 rate, making a statement that using Komatsu 155 instead of explosive is more expensive, but did not support such statement with any evidence.
D12.15.8	Respondent had submitted on a rate of RM6.00 per cu. M. applicable to another contract executed by Claimant in Sibu. I accept Claimant's submission that this is not applicable for the reasons stated in para. D12.2.5 and D12.14.1(b) and (c) above.
D12.15.9	In view of the foregoing, I find and conclude that the valuation of the proper rate of VO No. 22 is RM18.00 per cu. yd, evaluated by the Engineer as on 4 February, 1999 'after careful evaluation'.
D12.15.10	Claimant had submitted that they were entitled to the 20% add-on provided for in the SOR, since Respondent in all their submissions have not disputed the same. I do not accept this submission by Claimant, since the rate of RM18.00 (as valued by the Engineer) is for a completely new item of work not provided for in the SOR which does not constitute a starting point for this valuation, and as distinct from VO No. 21 and 52, it does not fall within the scope of the conditions governing the SOR. Instead on the construction of the Contract, this was a rate which was determined under the 2nd limb of Clause 15 (b) of the contract, viz by 'a fair valuation'.
D12.15.11	In view of the foregoing I find and conclude that for VO No. 22, Claimant is entitled to be paid the sum of 12,268 cu yd x RM18.00 = RM220,824.00

The above findings/conclusions of the arbitrator, in view of the clear and unambiguous provisions of (a) Clauses 15(a) and (b) of the General Conditions of Contract; (b) Clause 2.02 of General Specification for Building Works; (c) General Notes (1) and Item 41 of the Schedule of Rates and (d) Claimant's letter LTI/T/89/04 dated the 26th September, 1989 which said provisions have been set out by the arbitrator in Interim Award and/or Interim Award No. 2, are errors in law on the face of Interim Award No. 2.

The arbitrator ought to have given the following award in respect to VO No. 22:

(1)	Rock excavation at RM100.00 per cu. yd under Item 41 of the Schedule of Rates (12,2268 cu yd. x RM50.00):	RM613,400.00
(2)	Addition of 20%	RM122,680.00
	TOTAL AMOUNT:	RM736,080.00

A

And not the award of RM220,824.00 in Paragraph F6.0 of Interim Award No. 2.

(b) On Variation Order No 21 which reads as follows:

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D12.7.2	… Consequently Note (4) applies and the SOR rate cannot be applied without a 'reasonable reduction'.
D12.7.4	Using SOR Item 40 rate as a starting point to determine a new rate would have required Claimant to furnish a breakdown of Item 40 rate into the constituent costs of plant, labour, material, preliminaries, overhead charges and profit (see CFS 3.10 in para D12.2.4(g) above) and adjusting the rate as the quantities of work varies. However Claimant had not submitted in such manner, and thus failed in the burden of proof.
D12.7.5	I accept Claimant's submission that the starting point for this valuation is SOR Item 40, and that the add-on of 20% is contractual. I find that that being the case, all the terms in SOR will apply, including the 20% add-on. This is reinforced by the fact that the variation is of a similar character, and thus by clause 15(b) of the Contract SOR Item 40 is applicable after making 'a fair allowance … for the changed … quantity' [see para.D12.2.3(2) above]
D12.7.6	In view of the foregoing I find and conclude that Claimant is entitled to be paid for VO No 21 at the rate of RM50 + 20%, or RM60 per cu. yd.

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The above findings/conclusions of the arbitrator, in view of the clear and unambiguous provisions of (a) Clauses 15(a) and (b) of the General Conditions of Contract; (b) Clause 2.02 of General Specification for Building Works; (c) General Notes (1) and Item 40 of the Schedule of Rates; and (d) Claimant's letter LTI/T/89/04 dated the 26th September, 1989 which said provisions have been set out by the arbitrator in Interim Award and/or Interim Award No. 2, are errors in law on the face of Interim Award No. 2.

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The arbitrator ought to have given the following award in respect to VO No. 21:

(1)	Rock excavation at RM100.00 per cu. yd under Item 40 of the Schedule of Rates (2,892.23 cu yd. x RM100.00):	RM289,223.00
(2)	Addition of 20%	RM 57,844.60
	TOTAL AMOUNT:	RM347,067.60

And not the award of RM173,533.80 in Paragraph F6.0 of Interim Award No. 2.

(c) On Variation Order No 52 which reads as follows:

D12.11.2	My finding and conclusions on VO No. 52 are therefore similar to those found in Section D12.7 of this Award except as stated hereunder: —
	The rate determined by the Engineer 'after careful evaluation' was RM60.00 per cu. yd.
D12.11.3	In view of the foregoing Claimant shall be entitled to be paid under VO No. 52 at the rate of RM60 + 20% or RM72 per cu. yd.

The above findings/conclusions of the arbitrator, in view of the clear and unambiguous provisions of (a) Clauses 15(a) and (b) of the General Conditions of Contract; (b) Clause 2.02 of General Specification for Building Works; (c) General Notes (1) and Item 40 of the Schedule of Rates and (d) Claimant's letter LTI/T/89/04 dated the 26th September, 1989 which said provisions have been set out by the arbitrator in Interim Award and/or Interim Award No. 2, are errors in law on the face of Interim Award No. 2.

The arbitrator ought to have given the following award in respect to VO No. 52:

(1)	Rock excavation at RM100.00 per cu. yd under Item 40 of the Schedule of Rates (122.40 cu yd. x RM100.00):	RM12,240.00
(2)	Addition of 20%	RM 2,448.00
	TOTAL AMOUNT:	RM14,688.00

And not the award of RM8,812.80 in Paragraph F6.0 of Interim Award No. 2.

(d) In the event of the applicant succeeding in this application, the

applicant claims interest at the rate of 8% per annum on any increased award from the 30 October 1992, the final date of practical completion of the works, till the date of the award to be made by the arbitrator, and from the date of such award to the date of final payment; and costs of the arbitration and this originating motion.

The respondent in opposing the applications, inter alia, submits as follows:

(a) the crux of this matter is whether the court can exercise its power under s 23 of the AA 1952. Section 23 is related to law and there is no necessity for the respondent to file an opposing affidavit. Before s 23 can be invoked, the court must ask what the balance of convenience was and like any other discretions, it had to be exercised judicially. To invoke s 23, mere defect or misconduct is not enough, but the applicant must show that the defect or misconduct had amounted to the obvious defect in the award. Even though the court has a wide power to intervene, it must be exercised with care, otherwise there will be no finality in the award. The question whether the award should be remitted must be exercised with regard to all the circumstances of this case.

(b) in respect of Variation Order No 22 the arbitrator has clearly stated his reason based on the finding of fact during the proceeding. The learned arbitrator came to that finding without any mistakes in law. The reasons for rejection of the said sum have been dealt with by the arbitrator. It was based on evidence and proof as stated in D12.15.7 to D12.15.11. The failure of the claimant to prove during the proceeding cannot be challenged now. The interpretation of the contract document by parties had been submitted and has been considered by the arbitrator. There was no mistake in those decisions. This interpretation of contract was based on evidence given during the proceeding by the engineer and the claimant who carried out the project. The applicant's contentious have no justification. Since there are no errors that should be considered by this court this application should be dismissed with costs.

(c) in respect of Variation Order No 21 the arbitrator's reason for disallowing such sums has been dealt with during the proceeding. The finding of fact was made based on the evidence. The arbitrator also mentioned that the claimant has failed to discharge their burden of proof. The mistakes were on the claimant as they failed to produce the relevant document or witness to discharge their burden. They now cannot come to court to say that the finding of facts by the arbitrator was wrong at this stage. This court cannot re-evaluate the finding of fact which was before the arbitrator. The finding of law by the arbitrator was based on the document and reasons given.

(d) in respect of Variation Order No 52 there are no errors of law regarding

A the same. The arbitrator has given his reasons. The applicant has failed to show in his submission that the arbitrator has failed to analyse the law before him and demonstrate how this had gone to affect the award. The power to set aside or to remit an arbitrator's award is one that the court should exercise with great care and responsibility.

B (e) in respect of interests and costs the arbitrator has the same power as the court whether to award the interest. The arbitrator has discretion in awarding the interest and it is not mandatory. The claimant's right for interest is not a matter of right but only a matter of discretion, provided that he can prove it. The arbitrator can decide not to award interest and give reason for doing so. Alternatively, if the arbitrator decides to award interest, the rate should not be used to penalise the loosing party but only as compensation. The rate of 8% is only a maximum rate, but such other lower rate can be awarded.

D Section 23 of the AA 1952 reads as follows:

23(1)In all cases of reference to arbitration, the High Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.

E (2) Where an award is remitted, the arbitrator or umpire shall unless the order otherwise directs, make his award within three months after the date of the order.

F The law and jurisprudence relating to s 23 of the AA 1952 can be summarised as follows:

(a) Section 23 is pari materia to the s 22 of the English Arbitration Act 1950. This section provides power to the High Court to remit to the arbitrator or umpire for reconsideration. Though the grounds for G remission are not stated, the principles laid down from decided cases show that the High Court will remit to the arbitrator or umpire where the award is bad in law, or there has been a misconduct on the part of the arbitrator or umpire; save a defect or error is patent on the face of H the award, or the award is ambiguous or uncertain or is inconsistent with the terms of the contract, where there are new evidence after the making of award etc. In the case of *CK Tay Sdn Bhd v Eng Huat Heng Construction & Trading Sdn Bhd* [1989] 1 MLJ 389, Abu Mansor J observed:

I > Section 23 of the Arbitration Act confers a wide but limited discretion on the court to remit the award. Like all discretions, it had to be judicially exercised. Before the court can remit to the arbitrator, it had to ask what was the balance of convenience. *C* had not misconducted himself by failing to decide all issues referred to him and as remitting this matter to him will

cause hardship to the respondents and drag, this matter to no end, the balance of convenience lies in favour of the court not remitting the award back to *C*.

(b) Learned author of *Halsbury's Laws of England* (4th Ed) Vol 2 p 334 in the caption 'Error of law on face of award' states as follows:

> An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is now lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that that can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.
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> If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

(c) In *Dato' Teong Teck Kim & Ors v Dato' Teong Teck Leng* [1996] 1 MLJ 178, the Court of Appeal has asserted that there is a duty for the court to preserve the award unless there was an error of law on the face of it. Abu Mansor JCA (as he then was) opined (at p 190):

> Likewise, we unanimously hold that the dispute was properly before the arbitrator by consent, and that there is absence of any error of law by the arbitrator on the face of it. It is trite law that it is the duty of the learned judge to preserve the award unless there was an error of law on the face of it. We fail to find any. It was an award given by an arbitrator agreed to by both parties to a compromise agreement. Both agreed that, that particular cl 4.2 dispute, if any, would be resolved by a named arbitrator whose decision shall be final. Clearly, there was a dispute and one party brought the dispute before the named arbitrator. No court would or should allow the other party to renege on it. The other party must be bound by the decision of the arbitrator as he had agreed to be so bound.

(d) In *Chai Ming v The Overseas Assce Corpn Ltd* [1962] MLJ 282, Suffian J (as he then was) opined (at p 283):

> As regards (a), (b) and (c), the law is that in determining whether an award should be remitted or set aside on the ground that there is an error of law appearing on the face of it, the court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award, but must take the award at its face value, *James Clark (Brush Materials) Ltd v Carters (Merchants) Ltd*.

(e) The applicant must show error of law on the face of the award for the court to interfere as opposed to findings of the arbitrator on the facts of the case and deciding on the terms of the contract. In *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority*, His Royal Highness Raja Azlan Shah J (as HRH then was) observed (at p 211):

> The error of law on which it is sought to set aside the award can be summed up, more or less, into these points: (1) The arbitrator drew wrong inferences of fact from the evidence, (2) the arbitrator erred in assuming that the plaintiffs were estopped from challenging the validity, sufficiency or otherwise of the progress payment certificates after they had been signed by the plaintiffs and (3) the arbitrator had erroneously construed the plaintiff's letter dated 18 January 1967.
>
> Let me state here that this is not a rehearing. My sole purpose is to determine whether there is error of law on the face of the award. With regard to the first point, I am not satisfied that the arbitrator had drawn wrong inferences of fact from the evidence. Even if he did, that by itself is not sufficient as a ground to warrant setting aside the award. It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood'.

(f) The applicant in this case had also stated that he relies on the common law. The common law principle, if relevant, can only on the facts of this case be invoked to challenge the award. The Court of Appeal in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 dealt with s 24 of the AA 1952. Gopal Sri Ram JCA opined:

> In the absence of a contrary intention in the agreement to arbitrate, the award of the arbitrator is final, binding and conclusive, and cannot be challenged on the ground that it is erroneous. One exception at common law is where there is an error of law on the face of the award. Under s 24(2) of the Arbitration Act 1952, the court may set aside the award if the arbitrator has misconducted himself or the proceedings. The court, however, is not seised of jurisdiction to set aside the award on the ground that wrong inferences of fact have been drawn or that inadmissible evidence has been let in and acted upon.

(g) The learned editors of Annotated Statutes of Malaysia have documented cases where an award has been remitted under the following captions namely: (i) where fresh evidence has been acquired after the award but the court will not remit if the evidence was merely misunderstood or misconceived or the fresh evidence could not affect the conclusions arrived at by the arbitrator; (ii) where the arbitrator has exceeded his jurisdiction by dealing with a matter not submitted to him but if the arbitrator is given power to settle all questions, even if legal, he is able to decide finally whether or not there is a trade usage or custom affecting the contract; (iii) where there has been misconduct on the part of the arbitrator; (iv) where there has been an admitted mistake; (v) where there has been a mistake of law which is apparent on the face of the award but if the arbitrator is given power to settle all questions, even if legal, he is able to decide finally whether or not there is a trade usage or custom affecting the contract. The court cannot interfere where the mistake concerns a point which specifically referred to the decision of the arbitrator; (vi) where the award has not, or not exhaustively, dealt with the question of costs; (vii) where a mistake occurs in the form of the award due to the arbitrator not having the submission before him when he draws the award; (viii) where the award is in the form of a special case and leaves the question as to the measure of damages to the court, it will be remitted with an instruction as to the principle to be followed; (ix) where there is a refusal to state a special case or to delay the award till application can be made to the court to order a special case; and (x) where a point is taken but not argued before the arbitrator. I find the applicant's case does not fall into any of the captions stated therein though this was not the criteria for deciding this application.

(h) Generally, technical misconduct on finding of facts cannot be a basis to remit the award. There are number of exceptions. In *Chaim Tau Tze & Anor v The Sarawak Land Consolidation and Rehabilitation Authority and another case* [1994] 3 CLJ 605 Richard Malanjum J (as he then was) observed:

> Now, it is obvious that pre-award interest was not given nor considered by the learned arbitrator in making his award. No reason was given as well. In fact even the post-award interest was made upon the failure of the respondent to pay forthwith the sum awarded. Hence, I can only conclude that the learned arbitrator has failed to consider this aspect of his function and in my view such a failure constitutes a technical misconduct thereby allowing this court to order that the award be remitted to him for further consideration on the issue pre-award interest. In coming to such a conclusion I have taken guidance from what Kerr J said in *PJ Van Der Zijden Wildhandel NV v Tucker & Cross Ltd* [1976] 1 Lloyd's Law Report 341 at p 343:

> Although everyone knows how very inappropriate this unfortunate word 'misconduct' is, I am bound to say that in my view a failure to award any interest or to deal with interest in such circumstances constitutes technical misconduct. But even if I should be wrong about this, and if there was no technical misconduct in the sense of the arbitrator not having followed the ordinary practice and not having acted judicially in this matter, then I would still have remitted this case to the arbitrator so that he should make an appropriate award of interest. The reason is that it seems to me, as it did to the Court of Appeal in that case, to be quite wrong that in a dispute in which it has been held that one party should have been paid a sum of money some substantial time ago, which the losing and contractually liable party has had in its pocket for that period, there should nevertheless be no award of interest unless there be some exceptional jurisdiction for such a course.

Earlier on in his judgment Kerr J also said this at p 343:

> When there is a claim for interest, and when there is sufficient information before the tribunal to award interest and no contention to the contrary, then that authority and the earlier authorities referred to in it, show that in a commercial arbitration the arbitrator should ordinarily include interest in an award for damages. In such a situation it seems to me it is incumbent upon the other side to put forward reasons, either why no interest should be awarded or why it should for some special reason be confined to a shorter period than that beginning with the appropriate commercial time for payment, or why it should be at some special rate. When nothing like that is suggested, as was the position here, then it seems to me that a tribunal is not acting judicially if it fails to deal with the question of interest.

Accordingly, I hereby grant the order prayed for by the applicant in OM No KG 8 of 1993 only in so far as it relates to the award of interest up to the date of the award of the learned arbitrator.

(i) Allegations of errors of law and/or facts have to be proved before s 23 can be invoked. In *Tai Wah Construction Co v Government of Malaysia (Jabatan Kerja Raya Sarawak)* [2005] 2 MLJ 442 Mohd Ghazali JCA observed (at p 448):

> Before us, the appellant's counsel contended that since both parties had urged the court to remit the award to the reconsideration of the arbitrator, the learned judge should have accordingly made an order to that effect. The learned judge erred in law when he applied the principle adopted in *Ong Guan Teck & Ors v Hijjas* viz, that the power of the court is a discretionary one. Counsel pointed out in *Ong Guan Teck* the application was contested whereas in the instant case both parties consented that the matter be remitted to the reconsideration of the arbitrator.

> Section 23 of the Act confers a wide discretion for the court to remit an award. We however do not think that just because parties have formed the view that the award is bad on the face of it, the court need not go further and should grant an order in terms of any motion to remit the award to the reconsideration of the arbitrator. That seems to be the stand of the appellant in the court below and the appeal before us. In order to determine whether an award is bad on the face of it, which would warrant the award to be remitted to the reconsideration of the arbitrator, a judge will have to scrutinise the grounds of award and all accompanying affidavits and its contents presented with the motion before he can determine whether he should exercise his discretion pursuant to s 23 of the Act.

(j) It will be appropriate to state the error of law complained of to enable the court to invoke s 23 of the AA 1952. General allegation will not be sufficient. What constitutes error of law was well articulated in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, Gopal Sri Ram JCA opined (at p 342):

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute or misapplies or misstates a principle of the general law.

(k) In *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, His Royal Highness Raja Azlan Shah J (as HRH then was) opined (at p 211):

> It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a clear distinction between these two classes of cases and they decide that in the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one.

(l) The award of interest is at the discretion of the arbitrator. This is set out in s 21 of the AA 1952:

> Interest on awards.
>
> A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award at the same rate as a judgment debt.

> Commentary: Section 21 is pari materia to section 20 of the English Arbitration Act 1950. This section allows interest to be awarded on the award. The present rate for judgment interest is 8% per annum. It is submitted that the arbitrator or umpire has the discretion to award interest by virtue of the implied authority conferred on him. However the arbitration agreement may restrict such discretion. The commencement of the interest must be from the date of award unless otherwise stated in the arbitration agreement.

(m) In *Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd* [1994] 2 MLJ 51, Zakaria Yatim J (as he then was) opined:

> In the present case the parties had agreed in the arbitration clause in the contract that the construction, validity and performance be governed by Malaysian law. Under s 11 of the Civil Law Act, the court has the discretionary power to award interest for the recovery of any debt or damages. In the court's view the arbitrator had the same power as that of the court to award interest at such rate as he thought fit. Since it was within the discretion of the arbitrator to award interest in this case, the court would not interfere with the exercise of his discretion.

[6] I have read the originating motion, the affidavit in support and the submissions of parties in detail. Section 23 of the AA 1952 gives very limited powers for the court to intervene. It must be seen as an exception and not a general rule for applicants to come and complain in respect of award made by an arbitrator whom the parties have consented to. My reasons are as follows:

(a) In *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481, Gopal Sri Ram JCA opined (at p 488):

> … So jealously did the common law guard against curial inference with private arbitrations that it was most reluctant to create exceptions to the general rule.

The learned judge of Court of Appeal cited the case of *Union of India v Rallia Ram* AIR 1963 SC 1685 which reads as follows:

> The award in the decision of a domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it is reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement.

(b) Richard Malanjum JCA (as he then was) when delivering the judgment of the Court of Appeal in the case of *Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* [2003] 1 MLJ 49 at p 57 cited *Sharikat*

Pemborong Pertanian & Perumahan v Federal Law Authority [1971] 2 MLJ 210 where it was stated as follows:

> … the jurisdiction to set aside or remit an arbitrator's award whether at common law or under statute is one that should be exercised with great care and with a proper sense of responsibility. One may do well to keep in mind the words of Sharma J in *Puri Construction Pte Ltd v Union of India* AIR 1989 SC 777 at p 780:
>
> > When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act and it has no jurisdiction to sit in appeal and examine the correctness of the award on the merits.

(c) The applicant in this case had filed this application based also on misconduct but has not substantiated any iota of evidence or allegation of misconduct. The applicant purportedly says that there is an error of law on the face of the interim award but is not able to show the error of law. What the applicant is saying is that the factual matrix in deriving the quantum of award is not in line with the terms of the contractual provision. I have looked at the terms of the contractual provision. The terms which the applicant is relying on is one which needs the arbitrator to consider the facts, the evidence and submission of the parties before arriving at the conclusion what the quantum ought to be. In this respect, I take the view that the arbitrator has meticulously dealt with the matter, exercised his discretion and made the award on the facts and circumstances of the case. To complain now that the quantum should be higher does not fall within the purview of s 23 of the AA 1952.

(d) Parties to arbitration must respect that the arbitrator or arbitrators are the sole judge of the quality as well as quantity of evidence, and it is not open for the court to take upon itself the task of being a judge of the evidence before the arbitrator. An award cannot be remitted when the error complained of was committed in the exercise of the arbitrator's jurisdiction. Support for the proposition can be found in many Commonwealth cases where similar provision such as our s 23 of the AA 1952 is available. In *Bijendra Nath Srivastava v Mayank Srivastava* AIR 1994 SC 2562 the Indian Supreme Court observed:

> As regards an award made by an arbitrator under the Act the law is well settled that the arbitrator's award is generally considered binding between the parties since he is the tribunal selected by the parties. The power of the court to set aside an award is restricted to the grounds set out in s 30 of the Act, namely, (a) where the arbitrator has misconducted himself or the proceedings; (b) where the award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings

have become invalid under s 35; and (c) where the award has been improperly procured or is otherwise invalid. The court can set aside the award under clause (c) of s 30 if it suffers from an error on the face of the award. An award might be set aside on the ground of an error on the face of it when the reasons given by the decision, either in the award or in any document incorporated with it, are based upon a legal proposition which is erroneous. In the absence of any reasons for making the award, it is not open to the court to interfere with the award. The court cannot probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. An award is not invalid merely because by a process of inference and argument it may be demonstrated that the arbitrator has committed grave mistake in arriving at his conclusion. The arbitrator is under no obligation to give reasons in support of the decision reached by him unless under the arbitration agreement or deed of settlement he is required to give such reasons. If the arbitrator or umpire chooses to give reasons in support of his decision it would be open to the court to set aside the award if it finds that an error of law has been committed by the arbitrator or umpire on the basis of the recording of such reasons. The reasonableness of the reasons given by the arbitrator cannot, however, be challenged. The arbitrator is the sole judge of the evidence before the arbitrator. The court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal.

[7] In *Arosan Enterprises Ltd v Union of India* AIR 1999 SC 449, the Indian Supreme Court observed:

A court of competent jurisdiction has both right and duty to decide the lis presented before it for adjudication according to the best understanding of law and facts involved in the lis by the judge presiding over the court. Such decision even if erroneous either in factual determination or application of law correctly, is a valid one and binding inter parties. It does not, therefore, stand to reason that the arbitrator's award will be per se invalid and inoperative for the simple reason that the arbitrator has failed to appreciate the facts and has committed error in appreciating correct legal principle in basing the award. An erroneous decision of a court of law is open to judicial review by way of appeal or revision in accordance with the provisions of law. Similarly, an award rendered by an arbitrator is open to challenge within the parameters of several provisions of the Arbitration Act. Since the arbitrator is a judge by choice of the parties and more often than not a person with little or no legal background, the adjudication of disputes by an arbitration by way of an award can be challenged only within the limited scope of several provisions of the Arbitration Act and the legislature in its wisdom has limited the scope and ambit of challenge to an award in the Arbitration Act. Over the decades, judicial decisions have indicated the parameters of such challenge consistent with the provisions of the Arbitration Act. By and large the courts have disfavoured interference with arbitration award on account of error of law and fact on the score of misappreciation and misreading of the materials on record and have shown

definite inclination to preserve the award as far as possible. As reference to arbitration of disputes in commercial and other transactions involving substantial amount has increased in recent times, the courts were impelled to have fresh look on the ambit of challenge to an award by the arbitrator so that the award does not get undesirable immunity. In recent times, error in law and fact in basing an award has not been given the wide immunity as enjoyed earlier, by expanding the import and implication of 'legal misconduct' of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decision of the lis between the parties to arbitration. Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record have been held, very rightly, as legal misconduct rendering the award as invalid. It is necessary, however, to put a note of caution that in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidences intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator. In ultimate analysis it is a question of delicate balancing between the permissible limit of error of law and fact and patently erroneous finding easily demonstrable from the materials on record and application of principle of law forming the basis of the award which is patently erroneous. It may be indicated here that however objectively the problem may be viewed, the subjective element inherent in the judge deciding the problem, is bound to creep in and influence the decision. By long training in the art of dispassionate analysis, such subjective element is however, reduced to minimum. Keeping the aforesaid principle in mind, the challenge to the validity of the impugned award is to be considered with reference to judicial decisions on the subject.

[8] For the reasons stated above, I am inclined to accept the submission of the respondent that the application must be dismissed with costs. In consequence, I dismiss the originating motion with costs to the respondent. The getting up fees shall not exceed RM20,000. If costs cannot be agreed the respondent is at liberty to tax the costs. I hereby order so.

Application dismissed with costs.

Reported by Chew Phye Ken